UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

LONG ISLAND UNIVERSITY

Employer

and Case No. 29-RC-11462

INTERNATIONAL UNION,
SECURITY, POLICE AND FIRE
PROFESSIONALS OF AMERICA (SPFPA)

Petitioner[1][1]

and

BROTHERHOOD OF SECURITY
PERSONNEL OFFICERS AND GUARDS
INTERNATIONAL UNION

Intervenor[2][2]

DECISION AND DIRECTION OF ELECTION

Long Island University ("the Employer") is a private university, with a campus in Brookville, New York, herein called the C.W. Post Campus, as well as other campuses. On June 5, 2007, the International Union, Security, Police and Fire Professionals of America, SPFPA ("the Petitioner") filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of public safety officers ("PSOs") and dispatchers

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[1][1] The Petitioner's name appears as amended at the hearing.

[2][2] Although the Intervenor participated fully in the hearing, the Hearing Officer inadvertently failed to rule on the Intervenor's motion to intervene. There is no dispute that the Intervenor is the incumbent union representing the petitioned-for unit, and has a collective bargaining agreement with the Employer, effective from September 1, 2004, to August 31, 2007. On those grounds, I hereby grant the Intervenor's motion to intervene.

employed at the C.W. Post campus. The incumbent union, Brotherhood of Security Personnel Officers and Guards International Union ("the Intervenor") has a collective bargaining agreement with the Employer covering a bargaining unit of public safety officers and dispatchers.[3[3]] In other words, the Petitioner seeks to represent the same bargaining unit as the existing, contractual unit. However, the Employer now contends that dispatchers must be excluded from the unit as supervisors under Section 2(11) of the Act. Both the Petitioner and Intervenor disagree with the Employer, contending that the dispatchers are non-supervisory employees.

The Employer further contends that the dispatchers have an inherent "conflict of interest" with the PSOs since they must report to management any PSO's latenesses or failure to show up for work. The Petitioner and Intervenor likewise reject this contention.

A hearing was held before Zachary Long, a Hearing Officer of the National Labor Relations Board. In support of its contentions, the Employer called Howard J. White, associate vice president for labor relations and equal employment opportunity, to testify. The Petitioner and Intervenor did not call any witnesses. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

3[3] The current collective bargaining agreement is scheduled to expire on August 31, 2007. There is no dispute that the Petitioner filed its petition within the "open period" for filing, 60 to 90 days before the contract expiration. Leonard Wholesale Meats, 136 NLRB 1000 (1962).

FACTS

The following summary of the facts is based on the testimony of Howard J. White, which was undisputed, as well as on documentary evidence.

As noted above, the Intervenor currently represents a unit of public safety officers ("PSOs") and dispatchers employed at the Employer's C.W. Post campus. There are 20 PSOs and three dispatchers, i.e., a total of 23 employees in the unit. The current collective bargaining agreement between the Intervenor and the Employer (Board Exhibit 5), effective from September 1, 2004, to August 31, 2007, describes the unit as including "all Public Safety Officers and Dispatchers employed at the C.W. Post Campus" and excludes "all Sergeants ... and all other supervisory personnel." There is no dispute that dispatchers have been included in this unit for at least nine years, and the Employer has never raised the supervisory issue with the Intervenor for this unit. The Employer does not contend that the dispatchers' duties have changed in those years.

The Employer provides security for its campus 24 hours per day, seven days per week. The PSOs and dispatchers work in three shifts: from 7:00 a.m. to 3:00 p.m.; 3:00 p.m. to 11:00 p.m.; and 11:00 p.m. to 7:00 a.m. There are 5 or 6 PSOs and one dispatcher for each shift.

White testified regarding the hierarchy of the Employer's undisputed supervisors. Specifically, each shift has a "tour commander," who is ranked as either a sergeant or captain. The seven tour commanders work the same three shifts (described above) as the PSOs and dispatchers. At the beginning of each shift, the tour commander assigns each PSO to patrol a different geographical "sector" of the campus. The Employer's public safety department also has a director and assistant director, who work 9:00 a.m. to 5:00 p.m., Monday through Friday. All the undisputed supervisors are available by cell phone 24 hours per day.

The dispatchers work at a desk at the Employer's headquarters. Their duties include receiving radio transmissions and telephone calls, and monitoring the alarm systems. If an incident occurs (e.g., a medical emergency, break-in, or a fight in the students' dormitory), the dispatcher usually notifies the tour commander, then the tour commander decides whether to send a PSO to the incident site. However, if the tour supervisor is not at the desk or is otherwise unavailable, the dispatcher himself may direct a PSO to respond to the incident.

White testified that, on those occasions when the dispatcher directs a PSO to perform a task, the dispatcher bases his/her judgment on where the incident occurred (which "sector") and which PSOs are available at that time. White also testified that the dispatcher "may" have to judge which PSO is best for the job, such as sending a PSO who is also trained as an emergency medical technician (EMT) to a medical emergency, even if he is not in the same sector. However, White did not know of any specific examples of this happening.

The dispatchers' duties also include coordinating when the PSOs take their breaks, and directing PSOs to cover for each other's breaks. If a PSO is about to take a break when an incident occurs in his sector, the dispatcher may direct the PSO to postpone taking the break, in order to check on the incident first.

The dispatchers also contact outside parties, such as police, fire and EMT authorities, when necessary. In an emergency, the dispatcher may also dispatch an officer to the scene immediately, although White did not know of any specific examples of that happening.

White testified generally that dispatchers are "accountable" for any actions on their shifts. However, White did not recall any specific examples of dispatchers being disciplined or otherwise held responsible for the actions of PSOs on their shift.

Consistent with White's testimony, the dispatchers' job description in the public safety department's "standard operating procedures manual" (Board Ex. 6) includes duties such as monitoring telephone calls, radio transmissions and alarm systems; relaying such calls for service; documenting such information in the "desk log"; and dispatching PSOs and outside agencies.

Dispatchers and PSOs must be licensed by the state, and must renew their license every year. Both groups also receive training on such topics as first aid, emergency response, and procedures for increased coordination with law enforcement agencies pursuant to the federal Homeland Security Act. White testified that the training of dispatchers and PSOs is "pretty much" the same, except that dispatchers may learn more about the alarm and computer systems.

In terms of assigning overtime, White explained that there are two types of overtime work: expected and unexpected. When, for example, management expects a large crowd to attend a performance on campus, it assigns the overtime to PSOs in advance. On the other hand, if the need for overtime arises unexpectedly, the dispatchers may ask PSOs if they are willing to work overtime. However, White conceded that the dispatchers simply follow a pre-established overtime list, and do not exercise any discretion in this regard.

With respect to the Employer's conflict of interest argument, White testified that dispatchers are "placed in an awkward position" because they must report to the tour commander any PSO's lateness or failure to come to work, so that the tour commander can decide how to cover the shift. White asserted that dispatchers might be reluctant to report on their fellow bargaining-unit members, although he knew of no specific examples of such

"awkwardness." Furthermore, White conceded that the dispatchers do not impose, or even recommend, discipline for the PSOs' tardiness or absences.[4[4]]

There is no evidence, and the Employer does not contend, that dispatchers exercise supervisory authority with respect to hiring, terminating, transferring, laying off or recalling, promoting or rewarding PSOs. They do not grant leave to PSOs, evaluate them or adjust their grievances.

White testified that PSOs fill in for dispatchers. Specifically, since there are 3 dispatchers who work five 8-hour shifts per week, out of seven days per week, PSOs must fill in for dispatchers at least two days per week for each of the three shifts. In addition, PSOs fill in for dispatchers when they are absent or on vacation. When the PSOs do so, they are paid at the higher hourly rate for dispatchers, as provided in the contract. White was not sure whether dispatchers ever fill in for PSOs.

Finally, as for "secondary" indicia of supervisory status, dispatchers do not attend management meetings. They wear the same uniforms as PSOs. Both groups are paid on an hourly basis, although the dispatchers' rate is higher. In terms of the supervisor-to-employee ratio, there are currently eight undisputed supervisors for the existing unit of 23 PSOs and dispatchers. If the three dispatchers are considered statutory supervisors, then there would be a total of 11 supervisors for 20 PSOs.

LEGAL PRINCIPLES

Section 2(11) of the Act defines a supervisor as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the

[4[4]] Contrary to an assertion in the Employer's post-hearing brief (p.8), White testified expressly that dispatchers do *not* recommend discipline against PSOs (Transcript p.38).

foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11)'s definition of "supervisor," Congress stressed that only individuals invested with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen ... and other minor supervisory employees." Quadrex Environmental Co., Inc., 308 NLRB 101, 102 (1992)(quoting S.Rep. No. 105, 80th Cong., 1 Sess. 4 (1947)). It has long been the Board's policy not to construe supervisory status too broadly, since a finding of supervisory status deprives individuals of important rights protected under the Act. Id. A party who seeks to exclude alleged supervisors from a bargaining unit therefore has the legal burden of proving their supervisory status. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001)("Kentucky River"); Tucson Gas & Electric Co., 241 NLRB 181 (1979); The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989). Furthermore, to prove supervisory status under Section 2(11), the party must demonstrate not only that the individual has certain specified types of authority over employees (e.g., to assign or responsibly direct them), but also that the exercise of such authority requires the use of "independent judgment," and is not "merely routine or clerical" in nature.

In the Kentucky River decision, *supra*, the Supreme Court reaffirmed that the burden of proving supervisory status rests on the party asserting it. However, the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e., that alleged supervisors do not use "independent judgment" when they exercise ordinary professional or technical judgment, or judgment based on greater experience, in directing less-skilled employees to deliver services in accordance with employer-specified standards. Thus, the Board must seek to interpret the statutory distinction between "routine"

and "independent" judgment, without categorically discounting judgment based on professional/technical expertise or greater experience.

In the Oakwood line of cases,[5[5]] the Board refined its analysis of the terms "assign," "responsibly direct" and "independent judgment" within the meaning of Section 2(11). Specifically, the Board interpreted "assign" to mean the act of "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." Oakwood, 348 NLRB No. 37, slip op. at 4. To "assign" for purposes of Section 2(11) means the "designation of significant overall duties to an employee, not to the … *ad hoc* instruction that the employee perform a discrete task." Id.

By contrast, "directing" employees means generally overseeing them, deciding what task shall be undertaken next and who shall do the task, including *ad hoc* instructions to perform discreet tasks. Id., slip op. at 5, 6. The Board interpreted the phrase "*responsibly* to direct" to include an element of accountability. That is, an individual whom an employer has delegated authority to direct employees' work and to take corrective action (if necessary) "responsibly" directs those employees *only if there is a "prospect of adverse consequences* for the putative supervisor if he/she does not take these steps." Id., slip op. at 7, emphasis added. *See also* Schnurmacher Nursing Home v. NLRB, 214 F.3d 260 (2nd Cir. 2000)(charge nurses found to be supervisory, in part, because they were disciplined for failing to direct the assistants properly in providing patient care).

Furthermore, the Board in Oakwood interpreted "independent judgment" as follows:

5[5] Oakwood Healthcare, Inc., 348 NLRB No. 37, Croft Metals, Inc., 348 NLRB No. 38, and Beverly Enterprises-Minnesota, Inc., d/b/a Golden Crest Healthcare Center, 348 NLRB No. 39 ("Golden Crest"), all issued on Sept. 29, 2006.

> [T]o exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data…. [W]e find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement…. On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices…. Thus, … [t]he authority to effect an assignment, for example, must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'

Croft Metals, 348 NLRB no. 38, slip op. at 5, citing and summarizing Oakwood, slip op. at 8 (internal citations omitted). As one example, a nurse who must weigh employees' different skill levels and training in assigning them to patients uses independent judgment. Oakwood, slip op. at 8. *See also* American Commercial Barge Line Co., 337 NLRB No. 1070 (2002)(towboat pilots' assessment of crew skills and experience required independent judgment). By contrast, assignments when there is "only one obvious and self-evident choice" (e.g., a charge nurse assigning the one available nurse who knows American Sign Language to a patient who required ASL to communicate), or when the assignment is made solely on the basis of "equalizing workloads," are merely routine or clerical. Oakwood, slip op. at 8-9. *See also* Franklin Hospital Medical Center, 337 NLRB 826 (2002)(equalizing workloads as routine).

Finally, the Board affirmed the principle that conclusory statements by witnesses, without specific evidence to support those statements, do not demonstrate supervisory status. In Golden Crest Healthcare Center, *supra*, 348 NLRB No. 39, slip op. at 5, the employer claimed that charge nurses "responsibly directed" employees because their evaluations included a rating for how well they directed CNAs. However, without any evidence of actual or prospective consequences to charge nurses as a result of this factor, the Employer's claim

was found to be "merely speculative" and insufficient to prove accountability. Id. at p.5, citing Sears, Roebuck & Co., 304 NLRB 193 (1991). *See also* Franklin Hospital, *supra*, slip op. at 5 ("concrete evidence" required to show how assignment decisions are made); Nathan Katz Realty, LLC, et al. v. NLRB, 251 F.3d 981, 990 (D.C. Cir. 2001)(employer's claim that alleged supervisors exercise independent judgment by balancing "conflicting demands" rejected, without specific evidence in the record to support the claim).

APPLICATION TO THE INSTANT CASE

Based on the foregoing, I conclude that the Employer has not met its burden of proving that dispatchers are supervisors as defined in Section 2(11) the Act.

The record indicates that dispatchers may "direct" PSOs by instructing them to perform discreet tasks (i.e., to respond to a specific incident on campus), but only when the tour commander is not available to do so. The record does not indicate that such direction is anything more than sporadic or occasional. Furthermore, there is no evidence that such instruction requires "independent judgment." For the most part, dispatchers simply send a PSO who is in the relevant sector of the campus, or who is available. Such judgment does not appear to involve a degree of discretion that rises above the routine or clerical, as required in Oakwood, *supra*. White asserted that dispatchers may have to use judgment by dispatching a PSO based on their particular skills, such as EMT training, but his assertion was not supported by any specific evidence.

Furthermore, the record does not support a finding that dispatchers *responsibly* direct PSOs. There is no evidence whatsoever that dispatchers face the "prospect of adverse consequences" for failing to supervise the PSOs properly, such as taking corrective measures when necessary. Oakwood, 348 NLRB No. 37, slip op. at 7. Although White testified that

dispatchers are held "accountable," such conclusory statements by witnesses, without specific evidence to support them, do not demonstrate supervisory status. Golden Crest Healthcare Center, *supra*, 348 NLRB No. 39, slip op. at 5, citing Sears, Roebuck & Co., 304 NLRB 193 (1991).

The Employer does not contend, nor does the record indicate, that dispatchers possess any of the other supervisory indicia in Section 2(11), i.e., hiring, terminating, transferring, laying off or recalling, promoting or rewarding PSOs, or adjusting their grievances. Without evidence of such "primary" indicia, any "secondary" indicia (such as a higher wage rate) are irrelevant. Nevertheless, it should be noted that if the three dispatchers were considered statutory supervisors, then the Employer would have a total of 11 supervisors for only 20 PSOs, a ratio that undermines the Employer's contentions.

Finally, I also reject the Employer's "conflict of interest" argument. White's testimony that dispatchers might be in an "awkward" position when they report PSOs' latenesses or absences was merely speculative, and totally unsupported by actual, specific examples. Moreover, White conceded that the dipatchers do not impose or recommend discipline because of lateness or absence, thus further diminishing the Employer's argument in this regard.

Accordingly, based on the foregoing and the record as a whole, I hereby find that dispatchers employed by the Employer at its C.W. Post campus are not supervisors as defined in Section 2(11). I will therefore direct an election in the existing, combined unit of dispatchers and PSOs.

CONCLUSIONS AND FINDINGS

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that the Employer is a private university, engaged in providing higher education to undergraduate and graduate students. According to a questionnaire it submitted (Board Exhibit 7), the Employer is a domestic corporation. It has a principal office and one campus located at 750 Northern Boulevard, Brookville, New York, with additional campuses located in Brentwood, Riverhead, Southampton, Purchase, Brooklyn and Orangeburg, New York. During the past year, which period represents its annual operations generally, the Employer derived gross revenues in excess of $1,000,000, and purchased goods and/or services at its New York locations valued in excess of $5,000 directly from entities located outside the State of New York.

Based on the parties' stipulation, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated that both the Petitioner and the Intervenor are labor organizations as defined in Section 2(5) of the Act. They both claim to represent certain employees of the Employer.

4. A question concerning commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. I hereby find that the following employees constitute a unit appropriate for the purposes of collective bargaining:

> All full-time and regular part-time public safety officers and dispatchers employed by Long Island University at its C.W. Post Campus, 720 Northern

Boulevard, Brookville, New York, but excluding all other employees, office clerical employees, professional employees, sergeants and other supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by the International Union, Security, Police and Fire Professionals of America (SPFPA), or by the Brotherhood of Security Personnel Officers and Guards International Union, or by neither labor organization. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause

since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Two MetroTech Center, 5th Floor, Brooklyn, New York 11201, on or before **July 25, 2007.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless

the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **August 1, 2007.** The request may **not** be filed by facsimile.

The parties are advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described Request for Review electronically, please refer to the guidance which can be found under "E-Gov" on the National Labor Relations Board website: www.nlrb.gov.

Dated: July 18, 2007.

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
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Brooklyn, New York 11201